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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 762

JULES I. LITTWIN
Petitioner

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the Honorable, the Justices of the Supreme Court of the United States:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on November 16, 1964.

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals for the Sixth Circuit (R.) is reported at SW 2d , and is set out in the appendix hereof.

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on the 16th day of November, 1964, and copies thereof are appended to this petition in the Appendix.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

QUESTION I

Did the Court err in denying petitioner's Motion for a Mistrial on the grounds that the Government witnesses discussed their testimony with other Government witnesses who had been on the stand when they themselves had not been on the stand, even though the Court had ordered that all witnesses be excluded from the court room while other witnesses were testifying?

QUESTION II

Did the Court err by admitting in evidence, over the objection of the petitioner, the tape recording of the conversations between the petitioner and the Internal Revenue agent, David Sands?

QUESTION III

Did the Court err in allowing part of the tape recording of the conversations between the petitioner and David Sands to be played before the jury without requiring that all of the tape recording be played to the jury, or allowing the petitioner to play the remainder of the tape recordings to the jury, because such portions that the jury may have heard could have affected their judgment adversely to the petitioner?

QUESTION IV

Did the Court err in allowing Government witnesses, over the objection of the petitioner, to testify about portions of a conversation between the Government agent, David Sands, and the petitioner, which David Sands did not testify about himself, said agents having testified they heard said conversation by the use of an electronic transmitting and receiving device, or because the very exhibition to the jury and playing of any part of the electronic device without playing all of it was in itself prejudicial to the petitioner.

STATUTES, FEDERAL RULES AND REGULATIONS INVOKED

Fifth Amendment to the Constitution of the United States.

STATEMENT

The petitioner, Jules I. Littwin, was arrested on or about the 24th day of September, 1962, and an arrest warrant was issued later on the same day. On March 8, 1963, an indictment was returned against him, charging him with violation of Title 18, Sec. 201, U. S. C. (9a).

The petitioner is a certified public accountant and was representing certain companies in their tax difficulties and as such, had met several times with agent, David Sands, in an attempt to work out the problems of the petitioner's clients. During these meetings the petitioner and agent Sands had become personal friends and discussed their family problems and situations with each other. (R. 57a-59a). As a result of their intimate conversations, Mr. Littwin testified that he felt that Mr. Sands was soliciting a bribe to work out the tax matters for the petitioner's clients on a satisfactory basis. (R. 209a-215a). On September 24th, agent Sands and the petitioner got together early in the morning and were together until about the middle of the afternoon. During this period of time, the agent, Sands, had hidden on his body an electronic transmitting device and other agents who were members of the Internal Revenue Service, Intelligence Department, and special agents, were stationed at different points, keeping the defendant and Mr. Sands under sight and surveillance and monitoring an electronic receiving set which broadcast the tranmissions from the set on Mr. Sands' body. At the same time the conversations were recorded on an electronic recording device. (176a-178a). During the conversations of the day Mr. Sands and Mr. Littwin agreed that certain considerations would be given Mr. Littwin's clients and as the two separated, Mr. Littwin placed an envelope containing Two Thousand ($2,000.00) Dollars in Mr. Sands' brief case.

Immediately after the money was placed in the brief case Mr. Littwin was arrested.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the facts are such as to illustrate the dangers Chief Justice Warren had in mind when he said in the Lopez Case:

> "Thus while I join the Court in permitting the use of electronic devices to corroborate an agent under the particular facts of this case, I cannot sanction by implication the use of these same devices to radically shift the pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice."

This Honorable Court, has for a long time recognized and voiced its apprehensions of the possible dangers which are inherent in the use of electronic devices for the apprehension and trial of criminal suspects.

Each case concerning the subject has spoken of the limitations that must be placed on such use in order to safeguard and preserve individual rights.

The decisions have said that not only must the evidence presented to the jury by the use of electronic devices be competent and relevant evidence, but that the evidence must be acquired within certain limitations imposed by the decisions.

In the instant case, the matter presented to the jury by the use of the electronic device does not at any point rise to the dignity of evidence, either competent or incompetent.

It is without dispute that the tape of the conversation between the government agent and the petitioner was of very poor quality and almost beyond understanding. The Court stated he had been listening to tape for twenty-five minutes and had not understood a word. (R. 191a-192a).

The defendant had objected to the use of the tape by the government, and when the District Court ruled the tape admissable, the petitioner, because the tape was of such poor quality, objected to use of only parts of the tape and insisted that the tape be played in its entirety. The Court ruled that the tape had to be played in its entirety if played at all. (R. 190a). The Court, after allowing the tape to be played to the jury for twenty-five minutes, said he had not been able to hear any of the tape and after asking the jury if they had heard anything on the tape that would affect their verdict, and being answered in the negative, ruled that no more of the tape could be played to the jury.

The Court of Appeals decision held that the petitioner should have specifically requested to play certain portions of the remainder of the tape in rebuttal to the part of the tape that had been played.

Because of the poor quality of the tape, the petitioner could not tell what portions of the tape had been understood by the individual members of the jury and it is possible that portions understood by some members of the jury could not have been understood by the petitioner and his attorneys, and they were thus prevented from even attempting to rebut evidence understood by the jury.

It cannot reasonably be expected that a juror can know just what part of the evidence influenced his verdict and therefore, if any juror understood any part of the tape, it cannot be presumed that petitioner or his attorneys could understand the same portion, the tape being so poor that the ability to understand becomes one of individual difference in physical ability.

It thus becomes obvious that petitioner could not possibly have known which portions of the tape to rebut with the remaining portions of the tape, and in addition, that certain evidence was presented to the jury which could not physically have been understood by petitioner or his counsel.

However, even more important for the consideration of the Court is the question of whether, under the circumstances, the Court should have allowed the tape to be played at all, and whether it was prejudiced on the part of the United States District Attorney to play the tape when he knew that the tape was of such poor quality that it would have no practical value as evidence for the jury.

When the Court ruled that no more of the tape could be played, the District Attorney General said,

> "Mr. Smith: If the Court please, I think the recording has served its purpose anyway." (R. 192a).

The obvious meaning of this sentence is that the purpose of playing the tape was to produce a dramatic effect on the jury and that the sound of voices of the government agent and the petitioner on the tape, tended to corroborate the testimony of the government witnesses even though very little of the tape could be understood.

It is the position of the petitioner that the playing of the tape, under these conditions, could not be competent evidence and was prejudicial to the petitioner.

There is an additional element that should be considered. When parts of the conversation on the tape could be understood and other parts could not, the practical result was that certain parts of the conversation were taken from context and presented to the jury and the petitioner was then unable to supply the context. This violates the basic rule of evidence that statements may not be taken from context and presented to the jury.

The Court allowed government witnesses to testify, over the objection of the petitioner, about portions of a conversation overheard on an electronic device, which the government agent himself did not testify about. (R. 121a, 127a-128a).

The petitioner respectfully calls the Court's attention to

the opinion of Justice Warren in the Lopez case. (**Lopez v. U. S.,** NDL Ed. 2d 462, 470). In referring to the On Lee case, Justice Warren pointed out that the Court must guard and supervise the use of the electronic devices to provide fairness to the petitioner.

Justice Warren there makes clear that the only purpose for the courts to allow the testimony of an agent listening to a conversation over a transmitting electronic device when he is not present at the conversation, is to corroborate the testimony of the agent who is present during the conversation. Justice Warren stated this proposition as follows:

> "The use and purpose of the transmitter on On Lee was substantially different from the use of the recorder here. Its advantage was not to corroborate the testimony of Chin Poy, but rather, to obviate the need to put him on the stand."

It is clear, of course, that in the instant case the witnesses who were eavesdropping on the conversation by use of the electronic device, were not corroborating witnesses in that they testified to facts and matters to which Sands himself did not testify.

The remaining question concerns the Court's refusal to grant petitioner's motion for a mistrial when it was discovered that the government witnesses, all experienced Federal Internal Revenue Service agents, had been discussing the testimony of the witnesses that had testified and returned to the witness room. (R. 164a, 165a).

The Court of Appeals ruled that this is a matter within the discretion of the trial court and petitioner agrees that this is ordinarily the rule to be applied, however, in this case, the case of the government stands or falls entirely on the testimony of Internal Revenue Service Agents who worked together as a team and the testimony of each is related to the testimony of others. These men were experienced witnesses and it is inconceivable that they were not aware that their discussions about their testimony was a serious violation of the Court rules.

The violation is even more glaring in the light of the fact that a large part of their testimony was about the conversation between the petitioner and a government agent, which they heard by the use of an electronic transmitter on the person of the government agent, and it was patently to the advantage of the prosecution to have the testimony of the witnesses conform as closely as possible to the conversation as it was recorded on the recording device which monitored the conversation.

CONCLUSION

For these reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

G. Edward Friar
1114 West Clinch Avenue
Knoxvile, Tennessee

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition has this day been mailed to Hon. David Smith, Assistant United States District Attorney General, Federal Building, Knoxville, Tennessee.

This 11th day of December, 1964.

G. Edward Friar

APPENDIX

Filed Nov. 16, 1964. Carl W. Reuss, Clerk.

No. 15763

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Jules I. Littwin, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided November 16, 1964.

Before: Miller and O'Sullivan, Circuit Judges, and Brown, District Judge.

Miller, Circuit Judge. The appellant, Jules I. Littwin, was indicted for bribery of an Internal Revenue Agent, in violation of Section 201, Title 18, United States Code. The jury returned a verdict of guilty and the appellant was sentenced to two years in prison, from which judgment this appeal was taken.

Most of the facts are not in dispute. What dispute exists centers around the question whether the appellant was the one who first suggested a payment to the Revenue Agent and thereafter carried through with it, or if it was the Revenue Agent who initially brought up the subject by soliciting a bribe. Appellant contended and testified that the Revenue Agent injected the issue of a bribe into their discussions by the solicitation of it. This issue was determined adversely to the appellant by the jury verdict. In considering the legal questions raised on this appeal, it is sufficient to give the facts as shown by the Government's witnesses.

The Government's evidence showed the following. Sands, an Internal Revenue Agent, was assigned in April 1962 to examine the income tax returns of three corporations in Elizabethton, Tennessee. In connection with that assignment he was contacted by the appellant Littwin, who was a certified public accountant of New York City, and who was representing the three corporations. The parties made an appointment to meet on August 6. On August 6 Littwin came to the Internal Revenue office in Johnson City, Tennessee, met Sands there and the two of them walked to Littwin's motel room in Johnson City where Littwin said he had the books and records of the corporation and where they could be examined. Littwin told Sands that due to the crowded conditions and the distraction of a stranger working in the offices of the corporations and the fact that he preferred no one at Elizabethton to know that the corporations' books were being audited, he preferred to work in his motel room.

Agent Sands and Littwin worked in Littwin's motel room on the afternoon of August 6 and on August 7 and 8. During this examination Sands noticed that certain corporation checks had been deposited to a special fund account, but that there were no withdrawals from that account listed on the records. He asked Littwin for the records. Littwin said, "This is where we are going to have some trouble." He explained to Sands "Anybody can make these garments; all it takes is a little bit of material and a little bit of braid. The whole thing is for selling, and that takes a great deal of money; it takes, you have to spend money to attain clients and keep them." He also told Sands that the New York agents understood this type of business and that usually these expenditures were accepted.

On August 27 Littwin and Sands again discussed the expenditures shown for traveling and entertaining that were unsupported. Sands told Littwin that expenses of this nature were not allowable deductions and Littwin again replied that in New York the agents were aware of the necessity for cash expenditures which were used as part

of the business methods to attain and keep the business. Littwin suggested that there should be a mutual satisfactory adjustment and that Sands could benefit personally from a satisfactory agreement. Sands told him that he would go back and research the matter and meet with him the next day. Before he left, Littwin said, "How much and when do you want it and how do you want it handled?" Sands replied, "I told him that I didn't want to talk about it, that we could discuss it the next day."

Sands reported the matter to the Internal Revenue Service office in Johnson City and, at its request, he arranged with Littwin to meet on August 29 instead of August 28. At that meeting Sands and Littwin discussed certain proposed adjustments to the corporations' income tax returns. Littwin said that the corporation officers did not want any adjustments to the unallowable deductions because they, themselves, had traveling and entertaining expenses on their individual returns. Littwin said that he believed that they could reach a satisfactory agreement and asked Sands whether a couple of thousand dollars would be enough. Sands said "Yes." Thereafter they discussed the details of payment, such as that the bills would be in small denominations and the payment would be made in Johnson City rather than in New York. Littwin and Sands arranged to meet again on September 24.

Sands and Littwin met on September 24 and walked to the John Sevier Hotel. During the discussion at this meeting Sands told Littwin that the matter was causing him worry, that he was afraid of his job, and he did not believe that they should go through with it. However, Littwin reassured him about it and the two walked back from the hotel to Littwin's motel room. Littwin entered the room by himself and, after returning, asked Sands to hand him the little valise that he was carrying, which Sands did. Littwin placed an envelope in it, which contained $2,000.00 in cash. Sands and Littwin separated, and promptly thereafter Littwin was arrested by agents of the Internal Revenue Service.

During the meetings on August 29 and September 24 Sands had hidden on his body an electronic transmitting device, by means of which the conversations between the two were transmitted to a receiving set which was monitored by government agents who were keeping Sands and Littwin under sight and surveillance and who listened to the conversations. At the same time the conversations were recorded by an electronic recording device. The recording was of very poor quality and turned out to be unintelligible when it was reproduced at the trial.

At the start of the trial the District Judge ordered that all witnesses be excluded from the courtroom while other witnesses were testifying. However, several government witnesses, after testifying, returned to the witness room where there were other witnesses waiting to testify. Counsel for appellant moved for a mistrial on the ground that the witnesses who had testified, on returning to the witness room, talked with the prospective witnesses about the questions that were asked and their responses thereto. The Court overruled the motion, which appellant claims was prejudicial error.

We have recently held in **United States v. Bostic,** 327 F(2) 983, C.A. 6th, that violation of the rule separating witnesses does not automatically bar a witness from testifying. We held that it is a matter within the sound discretion of the trial judge, who could give consideration to whether the violation was wilful or with the knowledge and consent of government counsel. See also: **United States v. Brooks,** 303 F(2) 851, 853, C.A. 6th, cert. denied, 371 U.S. 889. Appellant's evidence on this issue does not show what questions and the responses thereto were discussed by the witnesses after they returned to the witness room. The witness, who testified that such discussion was engaged in, admitted on cross examination that such discussion was general and not specific, such as, was the experience rough or "Did they ask you very much?" The District Judge asked this witness, "Mr. Christensen, did you hear anybody come back in there and say, in effect, that they asked me particular kinds of questions and I gave

particular kinds of answers? Or anything of that sort?". to which the witness answered "No, sir." Appellant's attorney was given an opportunity to offer additional testimony, but did not do so. Under the circumstances we find no abuse of discretion on the part of the District Judge in denying appellant's motion for a mistrial.

We find no merit in appellant's contention that the District Judge erred in overruling appellant's motion for judgment of acquittal at the conclusion of all the evidence based on the ground that the evidence showed that the appellant was unlawfully entrapped into committing the bribe. As stated by the Supreme Court in **Lopez v. United States,** 373 U.S. 427, 434-435, rehearing denied, 375 U.S. 870, the defense of entrapment is concerned with the **manufacturing** of crime by law enforcement officers and their agents, which is far different from the permissible stratagems involved in the detection and prevention of crime. Entrapment exists only when the government agents induce and originate the criminal intent of a defendant. There is no entrapment where the criminal intent is already present, and the agents merely afford the opportunity for the commission of a crime. **Sorrells v. United States,** 287 U.S. 435, 441-442. If the foregoing evidence on behalf of the Government was believed, as the jury had the right to do, it appears clear that it was the appellant who suggested the payment of a bribe and that Agent Sands merely furnished him the opportunity of carrying it out. The issue was submitted to the jury under instructions which appear to us to be appropriate and to which no objection was made by appellant. **Masciale v. United States,** 356 U.S. 386, 388, rehearing denied, 357 U.S. 933.

Appellant complains of the use of the electronic transmitting device by Sands and the admission in evidence of incriminating statements heard by other agents by means of it. We are of the opinion that these contentions are fully answered by the opinions of the Supreme Court in **On Lee v. United States,** 343 U.S. 747, rehearing denied, 344 U.S. 848, and **Lopez v. United States,** supra, 373 U.S. 427. See also: **Rathbun v. United States,** 355 U.S. 107, rehearing denied, 355 U.S. 925; **United States v. Finazzo,** 288 F(2)

175-177, C.A. 6th, cert. denied, 368 U.S. 837; **United States v. Miller,** 316 F(2) 81, 83, C.A. 6th, cert. denied, 375 U.S. 935, rehearing denied, 375 U.S. 989.

Appellant also contends that it was error on the part of the District Judge to admit in evidence the tape recording of his conversations with Sands, which was also obtained by use of the electronic transmitting device.

This contention is also answered by the opinion of the Supreme Court in **Lopez v. United States,** supra, 373 U.S. 427, 432.

However, the following additional fact was involved in the present case. The District Judge, in overruling the objection to the playing of the tape recording to the jury, agreed with appellant's contention that if any part of it was played to the jury, the appellant was entitled to have all of it played to the jury. It was estimated that the playing of the entire tape would consume about three hours. The quality of the recording was very poor. After listening to it for about 25 minutes the District Judge stopped it and stated that he had not been able to understand what the witness was saying and he would not continue to let it run unless the Attorney General (sic) assured him that the remainder of it was of better quality and could be heard. Although the Attorney General (sic) said that he thought it would get better, he apparently did not give any such assurance. The District Judge then stated to the jury that if any one of them had heard a word, remark or phrase that might affect his decision in any way, to be honest about it and raise his hand. Upon no juror's so indicating, the District Judge, over the objection of the appellant, discontinued the playing of the remainder of the tape to the jury. Appellant contends it was reversible error not to permit the remainder of the tape recording to be played to the jury.

The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, cor-

respondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary. **United States v. Corrigan,** 168 F(2) 641, 645, C.A. 2nd. But this rule is subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction. There is no rule that either the whole document or no part of it, is competent. **United States v. Dennis,** 183 F(2) 201, 229-230, C. A. 2nd, affirmed, 341 U.S. 494, rehearing denied, 342 U.S. 842, 355 U.S. 936; **Camps v. New York City Transit Authority,** 261 F(2) 320, 322, C.A. 2nd; **United States v. Corrigan,** supra, 168 F(2) 641, 645, C.A. 2nd.

In objecting to the action of the District Judge, appellant's counsel contended that since some part of the tape had been played to the jury, the tape must be played in its entirety "because of the chance that there would have been a word or a remark or a phrase which might have come to the juror which would affect his ultimate decision." He does not point out even at this late hour what word, remark or phrase in that part of the tape which was played he would like to have explained or rebutted, or what part of the unplayed tape would be relevant or would throw light upon any word, phrase or remark which the jury had heard. The appellant has not shown that what was excluded was competent under this rule. **United States v. Dennis,** supra, 183 F(2) 201, 230, C.A. 2nd. The objection was based solely upon chance, the likelihood of which was as a practical matter rebutted by the inability of the jury to understand what was played to them.

It must be kept in mind that several government agents heard the conversations between the parties by means of the electronic device as it was simultaneously being tape recorded. Several of these agents, in addition to Sands, testified about what they heard. The evidence of guilt was strong.

The District Judge was confronted with a difficult practical problem, the solution of which called for the exer-

cise of his discretion. **United States v. Dennis,** supra, 183 F(2) 201, 230, C.A. 2nd. Under the circumstances, we are of the opinion that the ruling that the playing of the tape be discontinued was not an abuse of discretion and did not constitute reversible error.

The judgment is affirmed.